United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-1425

To be argued by
HENRY PUTZEL, III

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1425

UNITED STATES OF AMERICA,

Appellee

-against-

MICHAEL J. CAPANEGRO,

Defendant-Appellant.

B
p/s

On Appeal From the United States District
Court For the Southern District of New York

REPLY BRIEF FOR APPELLANT
MICHAEL J. CAPANEGRO

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February 17, 1978

UNITED STATES COURT OF APPEALS
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A. DANIEL FUSARO, CLERK
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ARGUMENT

THE GOVERNMENT IS NOT ENTITLED TO THE BENEFIT OF ALL FAVORABLE INFERENCES TO BE GLEANED FROM THE EVIDENCE AT TRIAL IN THIS NON-JURY CASE. ITS CLAIMS CONCERNING PROOF OF THE DEFENDANT'S CRIMINAL INTENT SHOULD THEREFORE BE REJECTED.

Apparently upon the erroneous assumption that, as in jury trials, the prosecution is entitled to the benefit of every inference to be drawn from the evidence, see Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Amrep Corp, et al., 560 F. 2d 539,543 (2d Cir. 1977), cert. denied, _____U.S. _____ (January 10, 1978), the Government makes a variety of claims with respect to the alleged proof adduced with respect to Mr. Capanegro's criminal intent. Such claims are misleading in the context of this non-jury trial. Many of the Government's assertions rest upon evidence which plainly was never considered by the trial court or made the subject of specific factual findings. Much of such evidence--as will be discussed hereafter--permits the inference that the defendant acted innocently and with no evil motive whatsoever. In the absence of special findings to the contrary, it is therefore patently unfair in this non-jury case to indulge in the same presumption in favor of the presecution's evidence as exists in post verdict reviews of evidence presented to a jury.

As Judge Friendly made clear in United States v. Maybury, 274 F. 2d 899, 902-3 (2d Cir. 1960), the "arbitral" element of a trial by jury precludes appellate review of the consistency of the jury's verdict.

In precisely the same spirit of forebearance, appellate courts have traditionally eschewed second-guessing the jury's process of reasoning in reaching its verdict and, in reviewing the evidence, have therefore construed it in a light most favorable to the Government. See, e.g., United States v. Glasser, supra; United States v. Amrep Corp., et al., supra; United States v. LaMont, 565 F. 2d, 212,216 (2d Cir. 1977). Such necessary latitude does not apply to appellate review of findings in a non-jury case. See, United States v. Maybury, supra, at 903. Indeed, of the scores of cases in which appellate courts have construed the evidence in favor of the prosecution, we have found no instance in which an appellate court invoked such presumption in a non-jury trial.

The instant case presents a compelling illustration of the dangers of the approach apparently urged by the Government. From the outset of the trial, Government counsel introduced literally hundreds of documentary exhibits, many of them by stipulation. Such exhibits were, indeed, so voluminous that Government counsel prepared and offered in evidence a loose-leaf binder which served merely to catalogue the other exhibits in evidence (GX. 97, T. 55-61). And the trial court, in understandable frustration, responded:

> What do you expect me to do, sit down at the recess and read all of this stuff? You are not being realistic. I know I'm not going to do it and I'll probably never do it. You have got all of this huge amount of material and if you think this is all going to get considered by me-- I don't want the record to have a lot of chaff in it. I'm not going to read it. (T.57; see also, T. 14-15).

Some of such documents were in fact utilized during the examination of witnesses at trial; certain documents were used by Government

counsel during summation to the Court; many such documents, however, were never highlighted in such fashion, and inferences from much of the testimony were never urged upon Judge Griesa. In its brief to this Court, however--and particularly in its contentions concerning the defendant's criminal intent--the Government urges inference upon inference from such evidence as if it were proven fact. With all respect, we submit that the evidence does not permit the inferences which the Government urges. In any event, although we do not contest the Government's right to argue such inferences, we respectfully point out that there is absolutely no indication in the record that Judge Griesa made findings in accord with such claims. Indeed, the trial court's thirty-four page opinion of special findings (A. 3-36) is singularly silent with respect to virtually all of the specific factual claims advanced by the Government concerning the defendant's alleged criminal intent. On this record, therefore, there is no basis for this Court to accept as proven fact the various contentions which the Government advances with respect to the defendant's intent.

We do not believe it appropriate--or necessary--to rebut every factual contention made by the Government in its brief. Without conceding by our silence any of those issues which we do not address, we make the following response to certain of the specific Government contentions concerning Mr. Capanegro's intent:

1. <u>There was no evidence that Mr. Capanegro sought to mislead the union hierarchy or union auditors concerning his legal services</u>.

The Government asserts that the defendant submitted his bills "to deceive outside auditors who would be examining union strike expenditures when the strike ended" and that, in submitting his bills

to Carnivale, Mr. Capanegro "knew that his descriptions of legal services would go unquestioned" (G. Br. 2-3). Such claims are not supported by the evidence. No auditor was called as a Government witness, nor was there any evidence that Mr. Capanegro knew when he submitted his bills that they would have to pass muster with union auditors. Indeed, the example of the bills submitted by Cunningham & Kaming suggested a far more facile approach to one seeking to deceive either the union or its auditors: Mr. Capanegro could have emulated his predecessors by submitting bills simply cataloguing the names of union members whom he represented or by stating in conclusory form the results obtained on behalf of each client.*

With respect to his relationship with the union itself, the evidence was clear that Capanegro's services were well known to the union officers who referred cases to him and that his bills therefore were equally subject to scrutiny of the executive committee of Local 1101. In particular, Carnivale, the union president, was consulted throughout the entire strike by Capanegro (T. 771-2, 925) concerning his services. And Government counsel himself elicited evidence that in three instances Carnivale declined to approve bills totaling $10,500 submitted by Mr. Capanegro (T. 927, GX. 9). Finally, of course, because Carnivale did not testify, the Government failed to establish that Capanegro deceived him in any way or intended in any to mislead him.

2. Mr. Capanegro's conduct during the investigation did not bespeak a guilty consciousness.

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* See GX. 46A-F, A. 141-153.

The Government asserts that, in his conduct during the investigation of the instant case, Mr. Capanegro's actions bespoke consciousness of guilt. In particular counsel points to Mr. Capanegro's letters to United States Attorney Paul Curran and the Assistant in charge of the investigation and to his statements therein concerning the manner by which his bills were drafted and submitted (G. Br. 10-12). Taken in context, none of the contentions is supported by the evidence. In point of fact, Mr. Capanegro's actions during the investigation show only an innocent person frantically--though, quite evidently, unsuccessfully--seeking to persuade the prosecutor of his innocence.

The voluminous correspondence with the United States Attorney was received in evidence in toto and is available for inspection by the Court (A. 108-134). In it, Capanegro voluntarily supplied extensive data to the prosecutor seeking to demonstrate his innocence. Moreover, he voluntarily turned over the legal files and other documents which ultimately formed the basis for a vast portion of the documentary evidence offered against him. The only legitimate inference to be drawn from such actions is that Capanegro was seeking to furnish the information which he genuinely believed would exonerate him.[3] The Government contends, however, that apparent inconsistency between his letters to Mr. Curran and his trial testimony concerning his responsibility for the bills in question demonstrates consciousness of guilt. Apart from the fact that the Court made no such finding, the statements are in fact not inconsistant. Both Mr.

Capanegro's letters to the prosecutor and the grand jury and his trial testimony (T. 944-951) recount the manner in which his bills were drafted and submitted. Both accounts take personal responsibility for submitting the bills and for the *in futuro* language therein but state that the secretary had the ministerial responsibility for sending the bills as soon as the particular matter arose. There was no inconsistency whatsoever between the letters and the defendant's testimony. Moreover, it should be noted that, although the Government had previously obtained an adjournment of trial in this case because of the unavailability of Mr. Capanegro's former secretary, the prosecution did not call her as a witness at trial, despite her availability. (See, T. 1504-5). Thus, the Government adduced no evidence to dispute the defendant's testimony concerning the manner by which the bills had been prepared.

CONCLUSION

For the reasons set forth herein and in appellant's brief, it is respectfully submitted that the judgment below be reversed and the indictment dismissed.

Respectfully submitted,

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